No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO, INC.,
Petitioner,
v.
RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER TEXACO, INC.

LAWRENCE F. HENNEBERGER
Counsel of Record
MARC L. FLEISCHAKER
JOYCE L. BARTOO
JOHN M. PACKMAN
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000
Counsel for Motor and Equipment Manufacturers Association

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MOTION OF MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER TEXACO, INC.

Pursuant to Supreme Court Rule 36.3, the Motor and Equipment Manufacturers Association ("MEMA") respectfully moves for leave to file the attached *amicus curiae* brief in support of petitioner Texaco, Inc. MEMA requested the consent of Texaco, Inc. and respondents Ricky Hasbrouck, *et al.* to the filing of this brief. Texaco, through counsel, gave its consent, but respondents, through their counsel, declined to give theirs.

MEMA is a trade association representing the interests of over 750 manufacturers of automotive original equipment and replacement parts. Founded in 1904, MEMA is the oldest trade association in the U.S. automotive industry, and it is the only association devoted exclusively to representing and serving the needs of U.S.

manufacturers of automotive parts, equipment, accessories, and allied products.

The American motoring public has long become accustomed to the ready and wide availability of automotive replacement parts regardless of a motor vehicle's age, make and model, or the geographic remoteness of the motorist. To meet that expectation, a complex distribution system for replacement automotive parts has evolved under which manufacturers use a number of channels and subchannels of distribution for products and charge varying prices tailored to functions performed by customers at each distribution level.

The decision below, if affirmed, will have an extremely adverse impact on one of the most efficient distribution systems in the world because, if upheld, it could severely restrict or eliminate functional discount pricing, upon which that system is based. MEMA believes that its participation in this case as *amicus curiae* will provide this Court with an important perspective on the issues raised by the decision below and its impact upon a consumer-responsive distribution system which has proven efficient and effective.

MEMA's proposed brief is attached.

Respectfully submitted,

LAWRENCE F. HENNEBERGER
Counsel of Record

MARC L. FLEISCHAKER
JOYCE L. BARTOO
JOHN M. PACKMAN

ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
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ARENT, FOX, KINTNER, PLOTKIN
& KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Counsel for Motor and Equipment Manufacturers Association

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BRIEF OF AMICUS CURIAE MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER TEXACO, INC.

The Motor and Equipment Manufacturers Association ("MEMA") respectfully submits this brief as *amicus curiae* in support of petitioner Texaco, Inc.

INTEREST OF AMICUS CURIAE

MEMA is a trade association representing the interests of more than 750 manufacturers of automotive original equipment and replacement parts. Founded in 1904, MEMA is the oldest trade association in the U.S. automotive industry, and is the only association devoted exclusively to representing and serving the needs of U.S. manufacturers of automotive parts and allied products.

Manufacturers of automotive replacement parts face the daunting task of assuring that replacement parts for

virtually every vehicle make and model are readily and widely available throughout the United States in service stations, car dealerships, general repair shops and retail outlets such as discount stores and a variety of volume retailers. This requires the maintenance of a massive, costly inventory, which is almost always experiencing some obsolescence and needs constant replenishment.

To assure that millions of replacement parts are available wherever and whenever the American motorist needs them, an intricate distribution system has evolved under which manufacturers use a number of intermediate channels and subchannels of distribution, such as warehouse distributors, jobbers, dealers, and retail accounts that make replacement products available to consumers. These distribution channels and subchannels perform various redistribution, warehousing, and related functions that assure the availability of these products to meet consumer needs whether those needs are satisfied by repair shops or on a do-it-yourself basis. The functions performed at each level of distribution are integral to the operation and efficiency of the overall system.[1] The price differences that exist reflect the functional differences between the different distribution levels and have been an important hallmark of the automotive replacement parts distribution system and its successful operation for many years.

This distribution system—one of the most efficient in the world—has evolved in response to consumer demand

[1] A typical warehouse distributor, for example, maintains warehouses in which a large quantity and wide variety of automotive parts of different manufacturers are stored. Warehouse distributors frequently deliver product directly to their customers and often have a sales force that visits customers to provide ordering and promotional assistance. They also extend credit. Thus, warehouse distributors perform vital functions in the distribution process, and have large investments in warehouses, trucks, sales forces, and credit to their customers.

and the expectation that the American motoring public should be able to obtain any part for almost any vehicle anywhere in the country. The system has worked efficiently for decades, and is continuing to evolve in response to consumer demand and market forces.[2]

The decision below, by establishing an unworkable standard for granting functional discounts, threatens to undermine this demonstrably efficient distribution system, and may expose auto parts manufacturers to treble damages for what has for decades been regarded as a customary and legitimate method of doing business.

According to the court below, Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), may be violated if a manufacturer grants a discount to a distributor that exceeds the cost of the distributing functions performed, and if the manufacturer does not police the distributor's resale prices to assure that no part of the discount is passed on to the distributor's customers. *Has-*

[2] The automotive replacement parts distribution system and the "competitive-functional pricing" in that system are described in detail in C. Davisson, *The Marketing of Automotive Parts* (1954). Professor Davisson describes the intense competition in the industry, the industry's sensitivity to market demands, and the importance of functional pricing in assuring the widest distribution of product:

> . . . individual sellers must strive to price so that satisfactory volume is obtained from each of several channels used. . . . The objective is to provide margins sufficient to assure sales through each of several channels used. *Functional pricing rests on the reasoning that the vendor is "buying distribution" by accepting different nets from accounts which differ in trade status.*

Id. at 39 (emphasis in original).

Competition among companies at each functional level of distribution tends to reduce these margins to a point approaching the costs of performing the distribution functions. *See id.* at 953. In short, the automotive parts distribution system and the functional discounts upon which that system is based reflect the free interplay of market demands and interests.

brouck v. Texaco, 842 F.2d 1034, 1039 (9th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3812 (U.S. June 13, 1989) (No. 87-2048). The court of appeals' decision superimposes upon the Robinson-Patman Act a "cost-based" requirement totally at odds with the long-standing interpretation of the Act and the policy behind it. It would be virtually impossible for MEMA members to ascertain the costs of each direct customer in the vast distribution system for automotive replacement parts. Even if such a "cost-based" requirement could be met, the resulting price differences to different distributors (which are later construed to be at the same level) based on their costs might expose the manufacturer to potential liability under the Robinson-Patman Act. Moreover, the court's directive that manufacturers monitor their distributors' resale prices raises serious issues of resale price maintenance, a *per se* violation of the Sherman Act § 1, 15 U.S.C. § 1.

Under these circumstances, an undesirable result of the decision below may be the severe restriction or elimination of functional discounts. Manufacturers could be forced to sell to all distribution levels at uniform prices, with the likely results being stabilized prices, the elimination of certain functions and services, and the end of the ready availability of automotive replacement parts in this country. MEMA members respectfully submit that the decision below threatens to jeopardize the efficient system by which automotive replacement parts have been distributed in this country for many years.

SUMMARY OF ARGUMENT

Congress intended the Robinson-Patman Act to assure fair competition among businesses at the same level of distribution. The Act's prohibition of price discrimination therefore does not apply where a seller's use of functional discounts results in different prices to customers at different levels of distribution. The Act does not impose a "cost-based" requirement as a precondition to providing such functional discounts.

By requiring that functional discounts be "cost-based," the court below would seem to require sellers to set their prices on the basis of information that they do not know and cannot accurately determine. Moreover, by requiring that sellers prevent their customers from "passing on" to subsequent purchasers any portion of a functional discount, the decision may expose sellers to treble damage liability for the pricing decisions of independent distributors—a result that is antithetical to the underlying policies of the antitrust laws. In short, under the Ninth Circuit's interpretation of Section 2(a), the legality of functional discounts seems to depend upon what a manufacturer does not know and cannot control—each customer's costs and independent pricing decisions. Such requirements do not find support in the Act or the policy behind it, are unworkable as a practical matter, and could result in the demise of functional discounts, to the detriment of the American consumer.

ARGUMENT

I. FUNCTIONAL DISCOUNTS DO NOT VIOLATE SECTION 2(a) OF THE ROBINSON-PATMAN ACT AND ARE NOT DEPENDENT UPON ANY COST-BASED JUSTIFICATION

Functional discounts have been an important part of the American economy since well before passage of the Robinson-Patman Act in 1936. *See* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* at 3-6 (1962); *Boise Cascade Corp.*, 107 F.T.C. 76, 209 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). Nothing in the language or the legislative history of the Robinson-Patman Act suggests that Congress intended to alter the time-honored practice of providing functional discounts. Indeed, one of the principal purposes of the Act was to preserve multi-level distribution systems by preventing powerful, direct-buying retail chains from inducing and receiving discriminatory price advantages over

their rivals who purchased from wholesalers. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 1, at 3-6 (1936) *reprinted in* 4 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes Part I* 3183-86 (1980). This Court has described the Congressional intention underlying the statute as follows:

> In short, Congress intended to assure, to the extent reasonably practicable, that businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned.

F.T.C. v. Sun Oil Co., 371 U.S. 505, 520 (1963) (emphasis added).

Consistent with that Congressional purpose, the courts and the Federal Trade Commission have established that the Robinson-Patman Act does not preclude a supplier from offering different prices to companies at different levels in the distribution chain because of the absence of any adverse effect upon competition. One of the clearest statements of this proposition is found in the opinion of Commissioner Elman in *Hruby Distrib. Co.*, 61 F.T.C. 1437, 1446-47 (1962):

> In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon particular competitors or competition in general.

Courts have confirmed the legality of differences in prices charged by a seller to two customers performing different functions. *See, e.g., White Indus. v. Cessna Aircraft Co.*, 845 F.2d 1497, 1499-1500 (8th Cir.), *cert. denied*, 109 S. Ct. 146 (1988); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Energex Lighting Indus. v. North American Phillips Lighting Corp.*, 656 F. Supp. 914, 920 (S.D.N.Y. 1987).

The court of appeals' decision below radically departs from established precedent by erroneously imposing a "cost-based" requirement as a precondition to providing functional discounts and requiring that manufacturers monitor their distributors to assure that non-cost-based discounts are not passed on to the distributor's customers.

The court's reliance upon *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), to support these requirements for the grant of a functional discount is misplaced. The Ninth Circuit erroneously seized upon the concept of the "pass on" of the discount from the favored wholesaler to the next two levels of distribution in *Perkins* and applied it to the entirely different facts of this case, where the favored and disfavored buyers operated at different functional levels, and where the "pass on" was the result of independent pricing decisions.[3] The *Perkins* Court was correctly concerned that the defendant should not be able to avoid liability "by the simple expedient of adding an additional link to the distribution chain." 395 U.S. at 647. In the instant case, in contrast to *Perkins*, the "pass ons" of functional discounts were the result of the pricing decisions of independent entities.

The main thrust of the *Perkins* case was the expanded definition this Court gave to the word "customer" under Section 2(a). *Perkins* does not support the lower court's "cost-based" and policing requirements as preconditions to the granting of functional discounts. These cumbersome and unworkable preconditions are fundamentally

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[3] In *Perkins*, the plaintiff was a wholesaler and retailer of gasoline purchased directly from Standard Oil, the defendant refiner. 395 U.S. at 644. Perkins alleged that Standard had sold gasoline to the favored buyer, Signal Oil & Gas Co., which then passed those lower prices on to its 60-percent-owned subsidiary, Western Hyway, which in turn passed the lower prices on to Regal Stations, a 55-percent subsidiary of Western. 395 U.S. at 647-48. Thus, in *Perkins* the same functional level was involved, and Signal, by virtue of its ownership interests, in effect controlled the next two levels of distribution, including the retail outlet.

at odds with any coherent and consistent interpretation of the Robinson-Patman Act and its legislative history.

II. THE COURT OF APPEALS' DECISION IS UNWORKABLE AND REFLECTS UNSOUND ANTITRUST POLICY

The decision below apparently requires manufacturers to establish for each customer that a functional discount is "cost-based" and to police distributors' resale pricing to prevent them from passing on any part of a non-cost-based discount. The former prerequisite is unworkable as a practical matter. The latter one, which seeks to have manufacturers intrude upon the pricing decisions of independent wholesalers, is antithetical to the antitrust policy that encourages price competition, and may expose manufacturers to treble damage liability for resale price maintenance. The court of appeals' requirements for functional discount pricing could force manufacturers to adopt uniform prices for all customers, regardless of their level of distribution and the functions they perform.

A. The "Cost-Based" Requirement Is Unworkable

Although the decision below is unclear as to whose costs must be included—the manufacturer's or distributor's —in the newly-created "cost-based" requirement for functional discounts, the decision appears to focus on the distributor's costs of performing functions. *Hasbrouck v. Texaco*, 842 F.2d at 1029. Automotive parts manufacturers cannot establish and maintain a pricing structure in which each individual distributor's discount is equivalent to the costs of the functions it performs; manufacturers do not have access to their customers' costs to be able to quantify them. Moreover, each customer's costs are different (based upon a number of variables within each customer's independent discretion), and will change over time. For example, the following factors, among

others within each distributor's discretion, will determine a distributor's costs: the location and number of warehouses or outlets; what and how many products are maintained in inventory; the number of days the product is stored prior to resale; the size of the distributor's staff and their compensation and training; to whom credit is extended and how much; how often deliveries are made by the distributor to its customers; the level of product promotion and the marketing assistance provided to customers; and the *pro rata* share[4] of all other fixed and variable costs associated with storing, delivering, promoting, and selling a given product.

Assuming for purposes of argument that manufacturers could somehow correlate each customer's costs with the discounts given, the resulting price differences to different distributors at the same level based on their costs could expose manufacturers to a potential violation of Section 2(a) of the Robinson-Patman Act. *See Boise Cascade*, 107 F.T.C. at 212. Moreover, such a variable discount system may reward the most inefficient wholesalers, *i.e.*, those with the highest costs—"an economically unfortunate reversal of desired incentives." *Id.*

B. The Decision Below Reflects Unsound Antitrust Policy And May Have Adverse Consequences For Consumers

The Ninth Circuit's decision may expose manufacturers to treble damage liability because it requires them to monitor and control the pricing decisions of their distributor customers over whom they exercise no control. This Court recently has affirmed the long-standing principle that resale price maintenance is *per se* illegal under the Sherman Act § 1, 15 U.S.C. § 1. *Business Elec.*

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[4] Warehouse distributors and jobbers typically carry automotive replacement parts of many different manufacturers, making it extremely difficult, if not virtually impossible, to apportion costs among them.

Corp. v. Sharp Elec. Corp., 108 S.Ct. 1515, 1519 (1988). By requiring manufacturers to involve themselves in a distributor's independent pricing decisions, the decision below in effect condones resale price maintenance activity.

The lower court's holding jeopardizes the system of multi-tiered distribution of automotive replacement parts, and may leave manufacturers with no workable or legally safe means to compensate wholesale distributors, jobbers, or dealers for the critical functions they perform in assuring the ready availability of parts to consumers. If the decision below stands, the result may well be a single price to all customers, regardless of their level in the distribution chain and the functions they perform. Price stabilization at the consumer level is the likely result, driven by the perverse logic that a supplier's pricing decisions should be keyed to its least efficient customer. Eventually, certain functions and services which the American consumer now takes for granted may be eliminated. This will disrupt, if not destroy, a time-tested distribution system based on the prompt delivery of millions of automotive products to consumers wherever and whenever needed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed, and that the legality of functional discount pricing—without the encumbrances imposed by that court—should be confirmed.

Respectfully submitted,

LAWRENCE F. HENNEBERGER
Counsel of Record
MARC L. FLEISCHAKER
JOYCE L. BARTOO
JOHN M. PACKMAN
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6000
Counsel for Motor and Equipment Manufacturers Association

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